

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE FOR AUTOMOTIVE	)	
INNOVATION,	)	Civil Action
	)	No. 20-12090-DPW
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MAURA HEALEY, ATTORNEY	)	
GENERAL OF THE COMMONWEALTH	)	
OF MASSACHUSETTS, in her	)	
official capacity,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK  
UNITED STATES DISTRICT JUDGE

BENCH TRIAL DAY 4

June 25, 2021  
11:04 p.m.

John J. Moakley United States Courthouse  
Courtroom One  
One Courthouse Way  
Boston, Massachusetts 02210

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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Douglas P. Woodlock, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 1, Boston, Massachusetts, on June 25, 2021.)

THE COURT: Well, let me first do a bit of housekeeping here. I want to be sure that we've got all the evidence that's going to be presented in the case here. I don't know that we do at this point. There was some discussion about additional materials. Of course I asked for materials regarding the referendum financing as well. But are there additional things that we need to get here that will be the foundation of any decision that I render, any additional evidence, any exhibits, anything that hasn't been put in? Mr. Haskell?

MR. HASKELL: Nothing from our side. And just to update the Court on the campaign financial materials, we have arranged with our Office of Campaign and Political Finance to provide those certified copies. They should actually be ready this afternoon. I will present them to plaintiff's counsel, then we'll be ready to submit those.

THE COURT: Okay. I think I mentioned even more valuable than a pile of documents is a summary chart there that

1 indicates who it was who was making contributions there using  
2 some sort of threshold for it. So I would hope that there  
3 would be a stipulation with respect to the underlying documents  
4 and a summary chart.

5 MR. HASSELL: We can certainly do that. So the Court  
6 would like to see in the summary chart just contributions over,  
7 say, a thousand dollars?

8 THE COURT: Yeah, I think that does it for me. If the  
9 reports that I had were accurate, the big players are  
10 identified at that level, and a thousand dollars is not chump  
11 change, so I think including it in a summary chart would be  
12 helpful.

13 MR. HASSELL: We can certainly do that.

14 THE COURT: Okay. So I'd like to have that -- well,  
15 we'll set a date for it in just a bit, but I'd like to have it  
16 before, and let me suggest a date for one final round of  
17 discussion that will include the motion to dismiss of the other  
18 claims. I was going to say Wednesday, July 21st, if that's  
19 agreeable to the parties.

20 It may or may not be in this courtroom. We're still  
21 going through the process of trying to make sure that we have  
22 adequately set up courtrooms for all of the things that we want  
23 to do. And this courtroom is now set up for criminal jury  
24 trials.

25 So is the 21st, 11:00 time period best for the

1 parties?

2 MR. NADOLENCO: That works on plaintiff's side, Your  
3 Honor. Thank you.

4 MR. HASKELL: That suits us.

5 THE COURT: Okay. So at 11:00 on July 21st, we'll be  
6 taking up the motion to dismiss the other claims and a final  
7 session to deal with things that are on my mind that will give  
8 you a chance to talk about them.

9 It may be helpful, I think, just because I always tell  
10 you what I'm reading that's pertinent, but with respect to this  
11 question of referendum and so on, I am drawn into this in part  
12 because of the question of severability that we'll talk about  
13 in just a moment and in part because it's a unique form of  
14 lawmaking.

15 I was trying to determine, and maybe the parties will  
16 be able to help me a little bit about this, about exactly what  
17 happened in 2013. I guess the initiative was pretermitted at  
18 that point so it became an actual statute. I say "an actual  
19 statute," but a regular statute, and that's how that was  
20 introduced.

21 This is a piece of legislation by the people, and the  
22 question of severability I think arises from that. I will be  
23 asking some questions in just a moment concerning it. But what  
24 I wanted to focus on, and it may be more useful for the  
25 plaintiffs than the defendants, but just as to reading, there

1 are two articles. One is, I'll call it a bible by Alex Gray  
2 and Tom Kiley that was in the New England Law Review 1991.  
3 It's called *The Initiative and Referendum in Massachusetts*, and  
4 it goes through, in a helpful way anyway, helpful to me, to  
5 remind me about what it was that was being undertaken, what the  
6 review of the Attorney General is, that sort of thing. But  
7 even more interesting in the sense of being or more interesting  
8 in the sense of being more provocative is an article by now  
9 Justice Kafker and David Russcol, who I think clerked for Judge  
10 Wolf at one point. That's in 2012 Michigan State Law Review,  
11 1279. It's called, *The Eye of a Constitutional Storm:  
12 Preelection Review By the State Judiciary of Initiative  
13 Amendments to State Constitutions.*

14 And I think it's not limited actually to state  
15 judiciary, although at that point Justice Kafker was on the  
16 Massachusetts Appeals Court, but it does make some forays into  
17 discussion of federal constitutional review. I say  
18 "provacative" because it raises a whole series of issues about  
19 how the courts, state or federal, get themselves involved in  
20 the review of initiative amendments. And the focus of course  
21 is -- not focus but the bulk of the information comes from  
22 Justice Kafker's consideration of Massachusetts initiative  
23 provisions, which is not surprising since he was Deputy Chief  
24 Counsel under Governor Weld.

25 In any event, I throw those out because I'm going to

1 go back to them in just a moment to talk about what the  
2 question of severability means here and also what the role of  
3 the Attorney General is in rulemaking in this context.

4 The question of redaction is even more telling to me  
5 now. I've gone through this stuff, and I can't for the life of  
6 me understand what needs to be redacted or why it does. Just,  
7 there's nothing there that I can see.

8 Now, that's in the untrained eye, of course, in  
9 looking at it. I recognize that many entities and individuals  
10 believe that their status in life is dependent upon the idea  
11 that they are the beneficiaries of some special privilege in a  
12 variety of senses in life, including evidentiary privileges,  
13 like the opportunity to keep confidential something that's not  
14 confidential at all but to claim that they can. I'm not  
15 intrigued by that.

16 So I want a very specific timeline on the review for  
17 purposes of continued redaction of any pieces of evidence that  
18 I have in this case. Maybe I'll use, just so we don't  
19 proliferate dates, by no later than July 21st. Everybody goes  
20 through it, and if there's anything you think continues to need  
21 to be redacted, I'd like to have a justification, specific  
22 justification line by line for anything that is continued,  
23 because otherwise, I think -- not otherwise -- I'm going to  
24 open up everything that I have that isn't properly subject to  
25 redaction in this case. That's a question of transparency I

1 think that's necessary.

2 So I didn't hear anybody say that there are more  
3 pieces of evidence other than the materials that would relate  
4 to campaign finance here, and as I said, I have to get that  
5 promptly.

6 So let me turn to this question, interrelated question  
7 of severability as to the initiative itself and the related  
8 question of what the Attorney General is required to do on the  
9 administrative level here. Reading the very helpful, actually,  
10 briefing that was provided last week, it does not appear to me  
11 that the Attorney General has taken the position that the  
12 initiative act is severable as a matter of law.

13 There is a discussion about whatever equitable  
14 authority I have to deal with this over a period of time that  
15 might involve review or constitute some sort of equitable,  
16 independent equitable action to resolve the case or resolve it  
17 at least before me. I'll put that off just a moment, but I do  
18 want to be sure that I haven't missed something here or there's  
19 not some fine-tuning that's necessary in dealing with this.

20 I have to say, my own view, reading the -- preliminary  
21 view reading this is, can't sever it. This comes as a piece of  
22 legislation that is presented in a way that doesn't lend itself  
23 to severability. It would be unfair to do it that way. People  
24 get to vote. They vote on a single act. There's no way to  
25 sever this, I don't think, unless we subcontract to people who



1 are not the people, the authority to do that sort of thing.

2 So is there any question from the Attorney General  
3 about that or any refinement that you'd like me to think about,  
4 putting to one side the question of whether or not I exercise  
5 some sort of residual equitable power that I might have to deal  
6 with timing and that sort of thing?

7 MR. HASSELL: I think that's right, Your Honor, as to  
8 the substantive requirements of law. As to the timing, you  
9 know, maybe that's viewed in a frame of equitable authority of  
10 the Court. Maybe it's viewed in a frame of severing just the  
11 timeframe portion of the law. That we believe is severable  
12 because it's distinct from the substantive requirements of the  
13 law.

14 THE COURT: How do we say that? I mean, well, of  
15 course we can say anything, but what does that mean? It is a  
16 statute that speaks at a specific time. It has an effective  
17 date of a specific time, and the idea that it would move for  
18 some different time suggests that the people who enacted the  
19 initiative did not decide that we're ready to go for the 2022  
20 model year, to use just one example. They're inextricably  
21 intertwined. I don't understand how they could be anything  
22 else.

23 MR. HASSELL: Well, Your Honor --

24 THE COURT: Just taking that a bit further, is there  
25 any case law that develops this idea that time is different

1 from substance for purposes of initiatives?

2 MR. HASKELL: In terms of distinguishing time from  
3 substance, I'm not aware of any that I can cite right now.  
4 What we would point to, though, Your Honor, is the intent of  
5 the voters in voting overwhelmingly --

6 THE COURT: Which one of them?

7 MR. HASKELL: -- for this legislation. Say again?

8 THE COURT: Which one of the many voters' intent?  
9 This is the legislative intent of a group of people who  
10 simultaneously voted at the same time.

11 MR. HASKELL: Well, I think the best source for that,  
12 Your Honor, is the official information for voters.

13 THE COURT: Whose intent is that? I mean, that's the  
14 intent of these pleasingly stated and decidedly confusion  
15 coalitions that push this kind of legislation? That's not  
16 legislative intent, if there is such a thing as legislative  
17 intent. Legislative intent is, here is the statute, or there's  
18 the act of the people. That's it. That's what I'm going to  
19 construe, I think.

20 MR. HASKELL: What we look to on this, Your Honor, and  
21 I am sure you know this, we cited it in our brief we filed a  
22 couple of days ago, it is actually California law. Obviously  
23 California has a great deal of experience with this sort of  
24 thing, much more than Massachusetts.

25 THE COURT: Is Massachusetts looking forward to

1 embrace California law on questions of initiative? Do I read  
2 the newspapers correctly?

3 MR. NADOLENCO: I have a lot to say on that, Your  
4 Honor.

5 THE COURT: Everybody does. So do I.

6 MR. HASKELL: Your Honor, the Massachusetts initiative  
7 scheme is unique, and it is its own thing. However, what's  
8 significant about that official voter publication is every  
9 voter in the state gets it. So when a court or somebody else  
10 trying to define the intent of the electorate is looking for  
11 sources, that's really the best you're going to do.

12 THE COURT: Why would I even be looking for sources,  
13 is I guess what I'm getting at. The best source is the text  
14 itself, maybe the history, maybe the -- the usual kind of  
15 suspects when you're construing a piece of legislation.

16 MR. HASKELL: Well, the intent, Your Honor --

17 THE COURT: The last recourse is to look around a  
18 crowd and pick out your friends, which I believe is the  
19 definition, operational definition of legislative history.

20 MR. HASKELL: Your Honor, the intent of the  
21 legislature does become important when it comes to  
22 severability. And of course the legislature in this case is  
23 the electorate. The question under state law as to  
24 severability is would the legislature have enacted the statute  
25 without the portion that that's found to be problematic and

1       that might be severable.

2               And as we argue in our brief, our view here is that  
3       the thing that the people of Massachusetts voted for  
4       overwhelmingly last November is the rights and abilities that  
5       they would obtain under the substance of the new Data Access  
6       Law.

7               THE COURT:   If they obtain that in the year 2075, I  
8       mean, who gets to decide that?   Do I get to decide that?   Say,  
9       "Yeah, they wanted it, but, you know, they knew it was pie in  
10      the sky, and they really wanted to wait until we had autonomous  
11      cars to deal with it," if that's where we are in 2070.   Really,  
12      is that the argument?   I've overstated it of course.

13              And if it's not 2075, is it 2074 or '73 or '72?   The  
14      point of course is to say that it's a big ball of wax, and I  
15      don't think I should be melting it.

16              MR. HASKELL:   Well, I suppose that brings us into the  
17      equitable considerations that in our view is kind of joined at  
18      the hip with this issue.

19              THE COURT:   So let me just -- I'm pressing on this  
20      because I've kind of come to rest, but rest is uncertain, that  
21      I look at it as it exists right now or as it exists on the  
22      effective date.   That's what I look at here, that that's going  
23      to be the defining date.   I can't think of any other date that  
24      I could use, except maybe the filing of the lawsuit, but that's  
25      even earlier.   So we're dealing with December 3 of 2020 as a

1 way of understanding what the statute is, for purposes of  
2 impossibility, of course, is really the issue that's being  
3 raised, raised most effectively.

4 I will of course go back and look at California law on  
5 this because this is a kind of -- and it's not just California.  
6 You know, this was one of the last efflorescences of good  
7 government, the idea of taking it away from the bosses and  
8 having initiatives that people could undertake. People may  
9 think a little differently about that in the sense that  
10 legislation is supposed to be developed by people who are  
11 thinking about these sorts of things over a sustained time  
12 period and making modifications.

13 Now, that may not be the way that people want to have  
14 things done. They may think that they've got better leverage,  
15 to use a term of art, in the context of initiatives. They may  
16 think that the legislature is in the bag on certain things.  
17 And all I do, I think, is to say this is authorized. I'm not  
18 making my judgments, and I think the Supreme Court for a very  
19 long time has been of the view that it's not -- this is a  
20 political question. It's not going to be something that the  
21 courts say, "That's a lousy way to make laws." It's the way  
22 they make the laws. But now I have to know what the rules are  
23 when they make the laws in that fashion.

24 And so I start with that basic proposition. I look at  
25 initiatives generally. That's why I raise the Justice Kafker's

1 and Mr. Russcol's article as provocative there, although now  
2 dated ten years, and there's been a lot more activity and  
3 apparently to be a lot more activity in this area on related  
4 kinds of issues.

5 So what you're tilting at I think is what basis there  
6 would be -- we'll talk about equity in a minute, but what basis  
7 there would be for me to find anything other than this is the  
8 piece of legislation I must construe in its entirety without  
9 any reference to severability as of December 3, 2020. That's  
10 the way I see it now. And, you know, I'll hear other views  
11 about that.

12 MR. HASKELL: I guess if it's helpful, just to make  
13 sure that we aren't inadvertently talking past each other here,  
14 kind of our view of the analysis on this is first there has to  
15 be some constitutional problem, some preemption. If there's no  
16 preemption, and we don't believe that there is for the reasons  
17 that we argue in our brief and will speak about today, then we  
18 never get into this issue of timeline.

19 THE COURT: And let me just say with respect to that  
20 that I'm going to get into everything. And I have to say that  
21 my own view is that this is one of those cases in which  
22 standing and merits are hard to distinguish with the human eye.

23 Now, they're distinguishable of course because they  
24 have different sources, but it's kind of how I'm looking at it.  
25 So I'm going to be dealing with all of those things at each

1 stage. And the first thing I am going to want to talk about is  
2 standing in just a moment.

3 MR. HASKELL: Sure. And I'm happy to speak to that  
4 when we get there. But the first step of the analysis is is  
5 there a preemption issue. In our view, the next step is, if  
6 there is an impossibility problem, is it of temporary duration?  
7 And that gets us into this question of can the model year 2022  
8 timeframe be severed, does the Court have the equitable  
9 authority to grant relief for that limited period of time. Our  
10 view is that if the analysis gets that far, then yes, the  
11 intent of the voters is such that the voters would prefer a  
12 temporary extension, say, of the model year 2022 timeframe  
13 entered under this Court's authority, which I think we all  
14 agree is broad and flexible and it's equity.

15 THE COURT: Well, I like the sound of that, but I have  
16 to say that I don't think it's quite that broad and quite that  
17 flexible. You've been focusing on general equitable authority.  
18 I've been conceiving it, because of the nature of the case, as  
19 an adjunct to appellate review and based upon an appellate  
20 review stay, if it comes to that. But in any event, I think  
21 we'll get to that issue in a minute.

22 But let me understand now the question of what are the  
23 Attorney General's responsibilities. And here, actually, you  
24 may be familiar with it, or maybe not, because it was done by  
25 Special Attorneys General David Mackey and Melissa Allison, the

1     *Blue Tarp Redevelopment* case came down on Wednesday, and it  
2     dealt with what is -- I'm familiar with, and of course it's  
3     written by Justice Kafker -- Auer deference, that is deference  
4     to an agency that is construing its own ambiguous regulations.

5             So everybody's got the citation, it's *Blue Tarp*  
6     *Redevelopment v. Wynn Resorts*. It arises out of the Gaming  
7     Commission's treatment of the blackjack statute, so it's fun to  
8     read. But it also deals with this set of circumstances. It  
9     appears that the way in which they made determinations about  
10    payouts and the regulatory regime that they had for it was  
11    ambiguous. But they consistently applied it, and they had some  
12    explanation for it. And then they got called on it by people  
13    who were not satisfied with the payouts that they received, not  
14    surprisingly, and then they changed it while the litigation was  
15    going on.

16            Now, it was sufficiently interesting, apparently, to  
17    the Supreme Judicial Court that what might to others of us have  
18    occurred to us to have been mootness was just blown by. And it  
19    came up in the context of *Blue Tarp*, which was a direct case, I  
20    believe it's the direct case, and also a certification from one  
21    of my colleagues who had something like that.

22            In any event, it's a very fulsome discussion of what  
23    is the responsibility of an agency. I think that you stand in  
24    your administrative role in the shoes of the Gaming Commission.  
25    And the idea of our kind of Auer kind of deference, as



1 developed I think quite accurately by Justice Kafker, is a  
2 little bit of balancing, and the deference is likely to be more  
3 -- the courts are likely to be more deferential in the context  
4 of longstanding but not quite regularized treatment of  
5 ambiguous regulations or sub-regulations, less so in the case  
6 of something that pops up in the course of litigation.

7 That's not a challenge to you. It just happens that  
8 here we are, and we've got litigation over it and, second, in  
9 the absence of notice and rulemaking.

10 And so part of my question is not to be answered --  
11 well, you can answer it now if you'd like to, but maybe you'd  
12 like to think about it. You're going to be doing notice and  
13 rulemaking in connection with this because you have an  
14 administrative responsibility here, and perhaps there will  
15 develop expertise regarding cybersecurity for cars in the  
16 Attorney General's Office to which deference should be shown.  
17 I'm not aware of it yet. Although, it's developing; I can see  
18 that.

19 MR. HASKELL: It's been a steep learning curve, Your  
20 Honor.

21 THE COURT: Right. Well, it is for all of us I think.  
22 But I guess I'm going to want a statement from the Attorney  
23 General of what it intends to do with respect to its  
24 administrative responsibilities in this area.

25 That goes back, frankly, to this question of equities.

1 That is to say, it was impossible for you to get a set of  
2 regulations up on December 3. No big surprise. But at some  
3 point it has to, and it's going to be governing in this -- not  
4 governing. It's going to be the subject of some deference on  
5 the part of the courts, I think. And so I just want to know  
6 what it's going to look like, if you can say what it's going to  
7 look like. It may be lots of agencies may say, "We don't need  
8 notice and rulemaking on this kind of thing," and that happens  
9 with distressing frequency here.

10 But I'd encourage everybody to read *Blue Tarp* because  
11 I think it is an important statement of administrative law,  
12 particularly state administrative law, to which I think I turn  
13 on this. I'm not applying the APA, federal APA. I'm looking  
14 to state law in making my determination. And I'd like to know  
15 that, and I think, you know, probably try to set a time for  
16 that, too, but I think I'd like it before the 21st so that I  
17 know what it is that you think you have to do in this area as a  
18 matter of law that will shape my view about severability I  
19 think as well.

20 MR. HASKELL: That's entirely fair, and we can provide  
21 that answer in the near term as the court observes. I don't  
22 think I'm in a position to give that answer right now as I  
23 stand here.

24 THE COURT: Right.

25 MR. HASKELL: I will say, though, Your Honor, that as

1 part of this case, the Attorney General's Office did take a  
2 number of positions about what the law and bits and pieces of  
3 its specific terms mean, and our intention in taking those  
4 positions was that they ought to be taken seriously, and they  
5 ought to stand the test of time.

6 THE COURT: Taken seriously, you got that. Test of  
7 time, time has a sign of mutability in connection with this  
8 case. I'll evaluate it from that perspective, but the question  
9 is what deference and how much do I give to it. And that -- I  
10 won't say it's cobbled together for present purposes, but it's  
11 certainly looking in the closet and saying, "What do we have  
12 hanging here that we can stitch together?" That's not  
13 cobbling. That's stitching.

14 But, you know, I'll go back and look at your proposed  
15 findings and conclusions. And I see the outline of what it is  
16 that you want. I just wonder what I'm supposed to do with  
17 that. That's simply -- not simply but it is not the kind of  
18 rulemaking that I'm perhaps more familiar with generally, and  
19 I'm not even sure that it rises to the level of dignity, that  
20 such dignity as Auer would call for in these circumstances, but  
21 that's open for some discussion generally. But I think that  
22 that's something that we have to bring to some sort of  
23 conclusion at least on the record in this case, it's a legal  
24 conclusion in the record in the case.

25 MR. HASKELL: Yes.

1           THE COURT: Okay. So let me -- Mr. Nadolenco, if  
2     you're going to be speaking to this --

3           MR. NADOLENCO: Yes, Your Honor, I'm happy to address  
4     any or all of it. With regard to severance, we agree with the  
5     Court's instincts. This is one law. It was voted on by the  
6     voters as one law. It is not severable. They were given an up  
7     or down vote on it. The equitable --

8           THE COURT: Let me pause with that.

9           MR. NADOLENCO: Yeah, sure.

10          THE COURT: So who am I looking to to be perhaps the  
11     initial expositor of that? Is it the Attorney General? And  
12     what is the format the Attorney General can do that in?

13          MR. NADOLENCO: Well, Your Honor, in this particular  
14     instance, I believe as Mr. Haskell just recognized, usually you  
15     defer to an agency when they have particular technical  
16     expertise. Here that's just absent.

17          THE COURT: Well, but, so what the people did is,  
18     without as near as I can see, having any idea who would have  
19     technical competence in this area because this is generally an  
20     allocation of competences, said that the Attorney General is  
21     going to be the person who does that. So they are the  
22     designated competent agency on that.

23          Now, if you're saying, "If they're competent, anybody  
24     is competent," which I think may be the subtext of what you're  
25     getting at, I'm not sure I have to accept that. You know, we

1 all do the best we can. They've been charged with this  
2 responsibility that it is what the people say they want, and  
3 they're going to gin themselves up to be able to do this at  
4 some point.

5 Now the question is what do I do in the interim? And  
6 that goes to this question of equitable powers. It may not be  
7 possible to implement this statute now for several reasons,  
8 including impossibility of compliance but also impossibility of  
9 a regulatory regime that the enactment intends.

10 MR. NADOLENCO: Your Honor, if I can just push on  
11 that. We don't believe that that is what the law intends. The  
12 statute or the law does not charge the Attorney General with  
13 any rulemaking. They're charged with one small section of  
14 drafting a notice that is ultimately given, but it's not  
15 rulemaking.

16 They don't have technical expertise. They didn't  
17 write this law. It was, as we heard during the trial, it was  
18 written for them. If there's any agency that does have the  
19 technical expertise that should be given deference here, it's  
20 NHTSA.

21 THE COURT: We'll talk about NHTSA in this context, so  
22 that you're all thinking about it right now, if your argument,  
23 and I think it is, is that the Attorney General is  
24 irresponsible not in a normative sense but in a descriptive  
25 sense as a rule-maker here, doesn't that apply equally to

1 NHTSA? You know, the galling part of all of this is that there  
2 is a kind of codependency between the automobile manufacturers  
3 and NHTSA, that in which NHTSA has this vague threatening power  
4 but doesn't have the boldness to do what EPA did.

5 And I'll use that as the template. That is to say,  
6 here is the statute. You've actually said, although you don't  
7 have the support of the Solicitor General in this one or at  
8 least the federal programs branch of the Department of Justice  
9 on this one, but, you know, they cracked heads and they got  
10 together and they exercised their authority, and they created a  
11 mechanism for dealing with very specific kinds of provisions,  
12 an administrative regime.

13 NHTSA has kind of bobbed and weaved its way through  
14 this for whatever reason. Maybe they think they have more  
15 power when they can seem to be vaguely minatory, sitting out  
16 there, maybe able to bring the shotgun from behind the door,  
17 maybe able to say, "We want you to do a recall, but we're not  
18 going to tell you ahead of time, and by the way, you have to  
19 tell us." That's not clarity. It's irresponsibility,  
20 descriptively.

21 MR. NADOLENCO: Understand, Your Honor. To be fair,  
22 the law is relatively new. It was passed by the voters in  
23 November.

24 THE COURT: Yes, that's true. I think that we'll get  
25 to this question of preemption in that context, but I don't

1 want to say that this is just kind of, here is a federal  
2 agency. The federal agency occupies the field. That's not  
3 quite the right word. But the federal agency defines what  
4 obstacles are and what the question of compliance might be, and  
5 they haven't done it. They've given us Delphic statements.  
6 The most recent one being a restatement of some testimony that  
7 they've given before. It was challenged vigorously by the  
8 Attorney General. Now it's part of the record because it's the  
9 statement of the United States attaching letters to members of  
10 Congress.

11 But the point I guess that I'm getting back to is that  
12 I don't have anything like that and don't seem to have any  
13 prospect of anything like that -- I mean, they're not as nimble  
14 as the Gaming Commission, that is, NHTSA isn't. I don't expect  
15 that two months from now they're going to create a set of  
16 guidelines to deal with this kind of thing. And so I'm left to  
17 decide who is it that I'm deferring to, and who is it who is  
18 going to instruct me on this kind of thing.

19 I start with the Attorney General. That's why -- and  
20 I think you've cabined the Attorney General's responsibilities  
21 rather significantly.

22 MR. NADOLENCO: Right. They have an enforcement role,  
23 Your Honor, to enforce the law as written, not to have the  
24 court become a super voter or super legislature to start  
25 excising commencing in model year 2022 and replacing it with

1 some other year. That's not what was voted on by the voters.

2 They voted on this particular law, and we believe the  
3 trial showed that this particular law is impossible to comply  
4 with, and it runs headlong into preemption issues. We agree  
5 with the court that there is not rules that NHTSA has set out,  
6 but they did do much more than they did in the VW case.

7 THE COURT: I'm almost compelled to say, "Which wasn't  
8 much, which was nothing." As a matter of fact, I think I  
9 checked last night to see whether or not the solicitor had  
10 filed, because she has been asked to file, she wanted to drive  
11 right by on this, she waived her right to reply, and the court  
12 went and got it into a conference and said, "No, by the way, we  
13 would like to hear from you." And they asked for it some time  
14 ago, and they still haven't heard, and yesterday was the last  
15 conference before the long conference.

16 MR. NADOLENCO: Well, the good news is Your Honor did  
17 hear. And here, the Department of Justice specifically said  
18 that the Data Law requires motor vehicle manufacturers to take  
19 actions that potentially pose serious cybersecurity risks by  
20 opening uncontrolled access to vehicle firmware. That's what  
21 we proved during the trial. They said if this evidence exists,  
22 this would be a problem. The vehicles would be a problem. It  
23 would be unsafe. We would order or force a recall. And that's  
24 what the evidence showed.

25 So now we're debating with what, if anything, the



1 Court should do, other than just strike down the law. And our  
2 view is that the Court can only strike down the law. It can't  
3 start amending it. When the voters were presented one single  
4 unified --

5 THE COURT: So let me -- I'm interrupting you, but of  
6 course I want to get right to this issue. Your theory of the  
7 case is it's either successful as of December 3, 2020 or it's  
8 not. It has to be able to be implemented on that date or not.  
9 And if it's not, that's it.

10 MR. NADOLENCO: Our theory of the case is it was  
11 knowingly impossible to comply with the law when it was passed.  
12 It remains impossible today.

13 THE COURT: You're going to have to answer my  
14 question. You'll get a chance to wind up, but I want the pitch  
15 on my question.

16 So I've got this law that I'm supposed to make a  
17 determination about. I've been told that looming in the  
18 background is some view by NHTSA not yet rendered and perhaps  
19 never rendered by administrative rulings, specific  
20 administrative rulings on this in the way that the EPA did with  
21 emissions controls, and I understand from you that I simply  
22 have to strike this down.

23 Now, another way of looking at it is to say, "Okay,  
24 there's the law. It can't be complied with, but we'll try to  
25 reframe this in terms of timing." And that's I think part of

1 what Mr. Haskell has argued, apart from -- the vehicle that I  
2 would do it -- that I've suggested I might do it with, which  
3 is, you know, some sort of stay-pending-appeal treatment of it.  
4 But back to the pitch.

5 MR. NADOLENCO: Yes, yes, Your Honor. But the  
6 question is why. Because to attempt to comply with this law,  
7 right, it's a law on the books. Section 2 was effective last  
8 year. Section 3 is essentially effective now with model year  
9 '22. The automakers would have to try to comply with the law.  
10 And what would that mean?

11 We heard the testimony that it's impossible to comply  
12 with as written. The only thing they could do to try to comply  
13 with it is to start stripping the cybersecurity protections on  
14 their vehicles so they don't violate it. That's where we run  
15 headlong into the preemption issue.

16 THE COURT: Well, that may be, but let me give you a  
17 foreshadowing of another dimension of the case.

18 Let's assume that the evidence supports the following  
19 findings of fact: that the two defendants here -- two  
20 representative plaintiffs here, excuse me -- don't want to do  
21 anything. They call to mind, is it -- well, I'm not sure who  
22 the fabulist is that I should look at, Aesop or someone after  
23 that. But it's the fable of the dog in the manger. The dog  
24 really doesn't want to be in the manger, but he just doesn't  
25 want anybody else in it.

1           What we have here is two automobile companies who, at  
2   least at the senior level, senior enough for me to receive  
3   evidence from it, say, "No, we haven't done anything, not doing  
4   anything, not even thinking about it." So what they're doing  
5   is saying, "This is impossible, and we will continue to make it  
6   impossible because we're not going to do anything about it."

7           Now, they may win as a result of the timing issue on  
8   that, but my potential reading of the evidence here is this is  
9   a game of chicken, to use another set of fables, perhaps more  
10   up to date, I'll call it -- well, games of chicken generally  
11   don't turn out that well for at least one or the other of the  
12   chickens. So I raise that because they can run, but they can't  
13   hide on this. Sooner or later they're going to have to address  
14   this kind of issue.

15           So, you say it can't be done. They say it can't be  
16   done, and they're not going to do anything to make it be done,  
17   and NHTSA hasn't done anything to make it be done. And then  
18   they say, "Well, it can't be done, so consequently, nobody can  
19   write a statute about this," or, "nobody can do anything about  
20   this," or "no state can take any action with respect to it."  
21   And I'm not sure that's where it's going to end up in terms of  
22   evaluation of preemption.

23           MR. NADOLENCO: Your Honor, we took very seriously,  
24   the auto manufacturers took very seriously your metaphor during  
25   the evidence phase of the case of the whistling past the

1 graveyard. They heard you loud and clear. At this point the  
2 parties are looking to the Court's equitable powers. And the  
3 Court sits in equity and has to decide now what to do with the  
4 circumstance you have laid out.

5 When you look at it from an equitable standpoint, we  
6 would submit that what you see is a group who, since before the  
7 ink on the 2014 MOU was dried, wanted the telematics data.  
8 They were talking to the manufacturers about it. There was  
9 discussion. At some point, and I'm not going to ascribe blame,  
10 they pivoted from discussions with the manufacturer to an  
11 initiative process. And we know from Mr. Lowe, he was  
12 specifically involved in picking --

13 THE COURT: I have that in mind. I didn't just fall  
14 off the turnip truck. But the point I guess that I'd say about  
15 that is, even in initiatives, maybe more so in initiatives now,  
16 at least the modern politics of initiatives or economics of  
17 initiatives, you know, there are contending economic groups.  
18 That happens.

19 You know, judges don't willy-nilly exercise their  
20 equitable powers because legislatures enacting legislation are  
21 a little bit like watching sausage be made. And, you know, we  
22 avert our eyes and so on. And sometimes it's blood sausage.  
23 Still don't do it. I don't have a general equitable power.  
24 That's my view. That's part of what this conversation with Mr.  
25 Haskell is. And so I'm trying to figure out what is my view.

1           Now, if you're thinking in a holistic way, of course  
2     you can think obviously about incentive structures and that  
3     sort of thing that can encourage the parties to get to yes in  
4     various ways. But I'm not sure where that goes with this.

5           I mean, that's why I refer to NHTSA as  
6     descriptively -- not normatively, I haven't taken that position  
7     yet -- but descriptively irresponsible and wanting to be  
8     irresponsible. They haven't stepped up to bat. They say, "You  
9     want to know what we think? What we think is this," hazy kind  
10    of thing, and, "It's up to you." Well, I'm not sure that's  
11    right and the proper exercise of the judicial function. But  
12    that's just me. Other judges might have different views about  
13    this sort of thing. I don't.

14           So I'm back to this idea, so I have equitable powers.  
15    What does that mean?

16           MR. NADOLENCO: Our view is it certainly doesn't mean  
17    rewriting the law. It is ruling on the law as written, as  
18    voted upon, not the law we wish was written or the law that  
19    could have been written or the law that the Attorney General is  
20    trying to rewrite. It is this law that's before the Court, and  
21    we believe we proved at trial this law is impossible to comply  
22    with short of stripping cyber protections from the vehicles,  
23    which means it is preempted under the Safety Act.

24           THE COURT: I'm not sure that I or the people who  
25    splashed around in the hot tub are of the view that it's

1 impossible.

2 MR. NADOLENCO: Today.

3 THE COURT: Well, today is a different issue. Timing  
4 is a different issue. The issue that was explored, I think,  
5 was, you know, it's not just putting a man on a moon. It can  
6 be done. Agencies -- manufacturers respond, as they did in  
7 connection with EPA emissions.

8 The question for me, of course, is what do I do about  
9 it. And that's a different set of issues. But I understand  
10 you to be taking the position this is not severable, got to do  
11 it as of December 3, 2020. That's the witching hour. It  
12 either turns into a pumpkin or it finds its silver slipper or  
13 glass slipper.

14 MR. NADOLENCO: The only other point I will make on  
15 that, Your Honor, and I know Your Honor did not fall off the  
16 turnip truck, but that date was picked on purpose by Mr. Lowe.  
17 He was involved in picking "Commencing in model year 2022."

18 THE COURT: Not the December 3 --

19 MR. NADOLENCO: No.

20 THE COURT: You mean the model year 2022, I  
21 understand.

22 MR. NADOLENCO: But just in general on the timing of  
23 the statute, let's not forget what the evidence showed. They  
24 picked the timing. They could have picked some reasonable  
25 year. Their consultant, after the fact to be sure, but their

1 consultant said, "Well, let's be reasonable here, let's give  
2 some real timeframes to the OEMs to actually try to comply with  
3 that. They said no, they said no. Our best value here is  
4 immense knowingly unfair timing leverage on the OEMs. That's  
5 what the Court is stuck with.

6 THE COURT: I understand that, and that's -- I think I  
7 understand that. That of course is the metaphor of the  
8 chicken. You play chicken like this, sometimes it doesn't turn  
9 out so well for the chicken. They go for broke on something  
10 like that, they create leverage on something like that, they  
11 create a statute like that, and it's a statute that doesn't  
12 work.

13 And so what does that mean? It means improvident  
14 deployment of the initiative process is what it means, I  
15 suppose. But that's where this -- at its outset anyway, that's  
16 where, from my perspective, it turns, right at the outset.

17 But as I said, I'm going to go through every part of  
18 this, every colorable part of this case. But I want from the  
19 Attorney General their view about whether they do rulemaking or  
20 what it is that they've undertaken.

21 They have provided me with their reading of this,  
22 which is drawn from various sources that are plausible, their  
23 language that's out there to treat the specific language here,  
24 but I do think this is a cut-and-paste job on the part of the  
25 initiative initiators to deal with that.

1           So, now let me turn, if I can, to the, let's call it  
2     question of standing and the problem of standing here. And I  
3     guess, Mr. Haskell, this is not really a trick question, but  
4     it's kind of one. Is there any question that GM or FCA could  
5     bring this action individually or as an entity and would have  
6     standing?

7           MR. HASKELL: It would have standing, Your Honor, but  
8     of course what they need to prove is impossibility, not  
9     impossibility for GM or impossibility for FCA.

10          THE COURT: No. I'm talking about them individually.  
11     They come in here and they say, you know, they don't have an  
12     organization, an association that brings in their name. There  
13     are various reasons why people might want to look to  
14     associational standing. It's always nice to be part of a  
15     crowd, that sort of thing. But if they did it on their own, GM  
16     says, "We've looked at this statute. This will kill us. We  
17     can't do it. We want an injunction. And by the way, if this  
18     thing goes through, we want damages for various things that are  
19     on the far side."

20          Now, on that issue, that is damages and so on, which  
21     really goes to the other counts of the complaint, it may be a  
22     standing problem for them on that, too. It's just not ripe  
23     yet. It's not ready to be resolved. If standing is close to  
24     mootness, it's close to all the kind of prudential -- and  
25     that's the word of art, "prudential" here. That's what that



1 third prong deals with. Prudentially, they may have a claim,  
2 individual claim, I think, but I want to hear your response to  
3 it.

4 And that's separate from the response to these other  
5 kinds of standing issues like trade secrets and copyright and  
6 all that stuff, not to mention Takings, which the chief justice  
7 helped us to learn a little bit more about earlier this week.

8 MR. HASKELL: So would an individual OEM like that  
9 have standing? Yes, probably. Would they have a private right  
10 of action? No, for the reasons that we spoke about in our  
11 pretrial brief, the *Armstrong* coupled with the fact that under  
12 the Safety Act and the Clean Air Act, the enforcer is the  
13 federal government, and it doesn't create private substantive  
14 rights. So would they have a right of action? No, probably  
15 not. Moreover, even if they succeeded in meeting their burden,  
16 that is an individual OEM --

17 THE COURT: So I understand you to be saying they  
18 don't have standing themselves to bring their own private right  
19 of action; they have to wait until somebody sues them, like  
20 NHTSA or some other entity or like the Attorney General. They  
21 just have to sit back and hope for the best.

22 MR. HASKELL: It comes back to NHTSA, Your Honor. It  
23 comes back to the federal government because that's the entity  
24 that, under the Safety Act, you know, has the substantive  
25 rights.

1 THE COURT: And if it doesn't exercise them.

2 MR. HASKELL: I'm sorry?

3 THE COURT: If it doesn't exercise them. That is,  
4 substantive rights, yes, that's what I was talking about  
5 earlier. I hasten to say descriptive irresponsibility as  
6 opposed to normative irresponsibility, although they frequently  
7 meet in the middle of the road together. So NHTSA doesn't, and  
8 so a manufacturer under those circumstances has to wait to be  
9 sued by someone.

10 MR. HASKELL: I think that's right. It reminds me of  
11 the case that was in -- you may be aware of this -- the case  
12 that was in Judge Burroughs' session a couple of years ago  
13 where neighbors were trying to invoke the federal Controlled  
14 Substances Act to prevent a marijuana dispensary from going  
15 into their neighborhood. The fact is marijuana is illegal  
16 under federal law. Not so state law.

17 And what the Judge Burroughs found there, correctly,  
18 is the enforcer of the Controlled Substances Act, the entity  
19 that has the ability to file a supremacy-based complaint is the  
20 Attorney General of the United States and not the neighbors.  
21 And I think the analysis here is very similar --

22 THE COURT: So let me just pause on that because  
23 that's helpful in straightening this away. So what is the  
24 response here? There is no private right of action, right?  
25 This is for you, Mr. Nadolenco.

1           We've got cases out there, as the Supreme Court has  
2       kind of tried to struggle through these problems, that can be  
3       read to say, in the absence of a private right of action, you  
4       have no right of action. This is, maybe you can say it's a  
5       1983 case but maybe not. In any event, how do you have a right  
6       of action at all here?

7           MR. LINDER: Thank you, Your Honor. We are not  
8       seeking to enforce a federal statute. *Armstrong* is a spending  
9       clause case, where essentially a third party beneficiary said  
10      the state wasn't giving them enough money and sought to enforce  
11      the federal law against the state of Idaho, and so too for the  
12      other cases.

13           This is not a case where we're seeking to enforce the  
14      federal law like the guy who wanted the federal marijuana laws  
15      enforced. This is a case where we are asking you to preclude a  
16      state from subjecting our clients --

17           THE COURT: But ordinarily -- I'm sorry to interrupt.  
18      But ordinarily I have some source of judicial power to  
19      entertain a case in controversy. There is not a free-floating  
20      ability to say, "There's a provision of the Constitution, I'd  
21      like to talk about that, I'm really interested in it." It has  
22      to be tied to something, it seems to me, tied to some  
23      jurisdictional grant generally, rather than the common law of  
24      relationships between the states and the federal government.  
25      So what's the jurisdictional grant that I have here?

1 MR. LINDER: Your Honor, it's the exact same one. I  
2 think it's a federal question of jurisdiction. It's exactly  
3 the same as was in *Geier* and in *Williamson*, the 2000 Supreme  
4 Court Case and the 2015 Supreme Court case. You're just  
5 deciding whether or not the state law conflicts with federal  
6 law, and that's the federal question.

7 THE COURT: Okay. So it's just simple federal  
8 question jurisdiction.

9 MR. LINDER: Yes.

10 THE COURT: Okay. Why doesn't that apply? I  
11 understand that they were reaching for spending clause cases.  
12 Why doesn't it apply to the spending clause cases, too? It's a  
13 federal question. Youth wants to know. We would like to know,  
14 does the spending clause apply under these circumstances?

15 MR. LINDER: Your Honor, a different part of Article  
16 III. Those cases were decided on standing grounds. Those were  
17 decided under *Alexander v. Sandoval*. Those were all standing  
18 cases. Here, as Mr. Haskell just conceded, individual OEMs  
19 would have standing.

20 THE COURT: I don't think he said that. I think what  
21 he said, and he'll tell me what he said, or he'll tell me what  
22 he wished he had said before but now says, that this is a  
23 circumstance in which they don't have standing at all. That  
24 is, the individuals don't have standing because they can't  
25 challenge the enforcement when there's no enforcement.

1 MR. LINDER: Different question. So standing and  
2 cause of action I think are separate. And they actually  
3 concede in their conclusions of law that we meet the first  
4 prong of the associational standing test, which is that an OEM  
5 would have standing individually to bring this case.

6 THE COURT: I know. That's why I asked them the  
7 question, and I got an answer that I think comes a little bit  
8 closer to what I was conceiving this to be, which is, trying to  
9 understand what I do with that contention, how I distinguish  
10 that contention regarding the jurisdictional grant for me to  
11 deal with this kind of thing. I understand you say standing  
12 and all that.

13 MR. LINDER: Yes.

14 THE COURT: But the point is that I'm not sure that  
15 the individual OEMs have standing to sue under these  
16 circumstances if there has been no concrete harm that's been  
17 visited upon them yet. There's the prospect of harm. There is  
18 the anxious anticipation of harm, but there isn't concrete  
19 harm.

20 MR. LINDER: Your Honor, that's a question of whether  
21 or not there's an Article III case or controversy, whether or  
22 not the issue is ripe. The *Armstrong* line of cases about a  
23 cause of action, a private right of action, is in a posit.  
24 This isn't a place where we're trying to enforce federal law.  
25 We're trying to make sure that we're free from irreconcilable

1 conflict.

2 THE COURT: But let's assume -- well, the analogies  
3 are always more specific, I suppose, and consequently raise  
4 their own problems. But use the marijuana issue as a general  
5 proposition. The Commonwealth permits a sumptuary activity  
6 that the federal government does not. The way in which it  
7 seems to be working out is somebody in the Department of  
8 Justice either decides to go forward on this or they don't.

9 And as a matter of prudence, perhaps, or something  
10 else, or don't ask, don't tell, the Attorney General of the  
11 United States is not pursuing, at least in Massachusetts, some  
12 of these issues that would be much more prominent. But does  
13 that mean anybody who would like to explore the distinctions  
14 between state and federal regulation of sumptuary activity gets  
15 to say federal question jurisdiction?

16 MR. LINDER: No, Your Honor, for two reasons. One,  
17 that person probably doesn't have a live Article III case or  
18 controversy. And two, the statute doesn't give them, the  
19 federal statute doesn't give them a private right of  
20 enforcement. But here we are in imminent harm from this law.

21 THE COURT: Okay. So now we're dealing with this  
22 question of imminent harm.

23 MR. LINDER: Yes.

24 THE COURT: And it has to do -- it has to have to do  
25 with the likelihood of enforcement activity here. And what do

1 I have on the record that tells me in the absence of action by  
2 this court there's going to be enforcement activity?

3 MR. LINDER: So I think you have a few things. You  
4 have that the law took effect December 3, 2020. You have that  
5 Section 3 takes effect as cars roll off the production line  
6 within the next weeks, months, and you have, but for the  
7 Attorney General's agreement to stay this case before July 30,  
8 not longer, they will enforce the law.

9 THE COURT: Well, I want to understand what that means  
10 because I'm not sure that they can. That is to say I'm not  
11 sure that there are regulations that permit them to do that.

12 Now, you've taken a -- for various reasons, you've  
13 taken a narrow view about what those regulations are or what  
14 they can do, and this of course creates perverse incentives for  
15 response on the part of the Attorney General, but what are they  
16 going to do?

17 MR. LINDER: Your Honor, it's not just them. It's  
18 also, there's a private right of action under this law.

19 THE COURT: So, private right of action, so we have to  
20 deal with that in the context of the private right of action.  
21 Do we wait around, that is to say you have standing or there's  
22 jurisdiction because 1983 says that somebody out there can  
23 bring a claim under 1983 -- excuse me -- under 93A?

24 MR. LINDER: Yeah, I mean, they can --

25 THE COURT: How imminent does the enforcement have to

1 be to create the sufficient basis for anticipation to bring  
2 this action?

3 MR. LINDER: The law is on the books, and the  
4 preemption case law presumes compliance with the state law. We  
5 are supposed to, but for the AG's stay, be complying with this  
6 today, but it's impossible and impossible to do safely.

7 THE COURT: But we've all agreed -- maybe we haven't  
8 all agreed, but it seems to me clear that there's enforcement  
9 and there's enforcement. There's desuetude. There are a whole  
10 series of -- I keep referring to them as anxious apprehensions  
11 that aren't really sufficient to justify this. And I'm trying  
12 to understand whether you are prepared to agree that it has to  
13 be something more than law on the books.

14 MR. LINDER: So let me say two things. First, we're  
15 now well outside of *Armstrong* land --

16 THE COURT: Maybe we are. I view those cases as not  
17 very, as Judge Garrity would have said, not very helpful, and  
18 the result of, you know, ongoing dynamics of the court in  
19 trying to deal with a certain kind of increasing awareness of  
20 what the potential is for preemption.

21 And I want to think about it more thoroughly, but now  
22 I'm asking you to help me, and in helping me, I think you have  
23 to tell me something more than there's a law on the books and  
24 consequently we're going to have to -- we've got to enforce it.  
25 We've got to anticipate that there will be enforcement, and



1       that gives us the right of action.

2               MR. LINDER: I don't think either the legislature or  
3       the Massachusetts AG's Office has said they won't enforce the  
4       law on the books. If they want to commit not to enforce it,  
5       we'd love to hear it.

6               THE COURT: Okay. Maybe they'll do that. I don't  
7       think they will. But they have to walk a fine line on this  
8       because to the degree that they say they will enforce it, they  
9       are increasing the likelihood that you have a jurisdictional  
10      basis for proceeding and that we have a case or controversy.

11              MR. LINDER: Your Honor, respectfully, we already do  
12      have an Article III case or controversy. Our clients sell cars  
13      in Massachusetts. They're subject to this law. They're  
14      subject to federal regulation, the Motor Vehicle Safety Act.  
15      They cannot comply with both. That's today. That's now.  
16      That's not an anxious apprehension. That's the state of  
17      affairs.

18              THE COURT: And in a context in which NHTSA is doing  
19      nothing? I mean, they say lots, but they're doing nothing.

20              MR. LINDER: They've ordered a recall of 1.4 million  
21      vehicles the first time they found a cybersecurity problem.

22              THE COURT: In 2015 they did that, right? What have  
23      they done since? What have they done to refine all of this  
24      since?

25              The point I guess is that they do not have a

1     reticulated administrative program that would tell people what  
2     it is that you're going to get yourself in trouble for. It  
3     could be viewed as arbitrary and capricious on their part when  
4     they enforce. And that's why I talk about this sense of  
5     codependency between the automobile manufacturers and NHTSA in  
6     which NHTSA keeps this authority. On the other hand, it's not  
7     exercised. And so the automobile manufacturers are able to  
8     make their choices about how open they're going to be about  
9     their architecture.

10           All of that being the larger background of when is it  
11     that this is triggered? When is it that you can bring a  
12     lawsuit? The mere fact that NHTSA could do something and did  
13     something in 2015 is, I'm not sure, enough. But maybe it is,  
14     maybe it is. And similarly, look at the Attorney General.  
15     What are they going to do? And I guess -- well, of course I'm  
16     going to ask Mr. Haskell, and he's going to respond in some  
17     way. But what I do know is he's not doing something now  
18     because there's a stipulation, and because I was concerned that  
19     I get to develop this.

20           Now I'm developing it. Now I want to understand, you  
21     know, how I deal with this set of concerns in the law about --  
22     and we can call it ripeness, we can call it mootness, we can  
23     call it standing. The larger idea is prudence, and prudence is  
24     in the eye of the beholder.

25           And so the question is do we have standards for

1 prudence in this area? Because the ultimate danger, I just  
2 have to say, is that this is going to be filled by some judge  
3 or judges who decide, "I really don't like this policy, so I'm  
4 going to find standing, I'm going to find ripeness, I'm going  
5 to find that it's not moot for this one because this is the  
6 kind of policy I want to get after." Or another judge who  
7 says, "Oh, there's no standing here. You know, come on, move  
8 it along people. Nothing to look at."

9 And that's the danger here, and I want to understand  
10 if you have some mechanism or some standard that I should use  
11 in dealing with this other than there's a statute, and there is  
12 someone who has got a badge that means they can enforce things.

13 MR. LINDER: I mean, it is hard to imagine a riper  
14 declaratory judgment action than this one. There are two laws  
15 on the books. The AG has been parsimonious in how long it will  
16 stay enforcement of the law. We have every reason to believe  
17 that once this case is done, on July 30, if our clients are out  
18 of compliance, they'll enforce it.

19 THE COURT: So let me stop. Mr. Haskell, are you  
20 going to enforce as of July 30 or August 1?

21 MR. HASKELL: Our stipulation, Your Honor, was that --  
22 as I recall, we actually stipulated not to enforce it while  
23 this case is going on and reserve the right to revisit that.

24 THE COURT: Okay. So you reserve the right. What are  
25 you going to do? I mean, this is cat and mouse, but that's

1 kind of where some of the law is on this. Is there a  
2 likelihood that you're going to enforce?

3 MR. HASKELL: What I can say, Your Honor, and I can  
4 say this with confidence, is that what our office wants to see  
5 happen here is get to the right answer. And so if that means  
6 threatening enforcement to move things along, maybe that's what  
7 it comes to.

8 THE COURT: All right. So I rule on it and say  
9 there's enough here to justify declaratory judgment, and you  
10 get the right answer -- well, you may not think it's the right  
11 answer, but you get an answer about this. Does that make your  
12 argument go away on Article III?

13 MR. HASKELL: I'm sorry, I didn't follow that.

14 THE COURT: Does that make your argument go away on  
15 Article III? If you said, "Well, it's up to you, Your Honor.  
16 If you do it, that's okay. If you don't, well, that's okay.  
17 We're not taking a position about what we're going to do in  
18 terms of enforcement."

19 MR. HASKELL: Our concerns about Article III really  
20 come from the associational standing thing and the nature --

21 THE COURT: But we just had a little conversation  
22 about whether or not the individual entity would have standing  
23 as well. And I understood from that that you had some  
24 reservations about the individual entity having standing to  
25 bring this action or that there was an Article III case or

1 controversy presented because you haven't taken any action  
2 against GM individually. You haven't taken any action against  
3 FCA or anybody who is not complying.

4 MR. HASSELL: Truth to tell, I'm not sure if I would  
5 personally would think of that as a standing thing or a ripe  
6 injury thing.

7 THE COURT: Well, I think -- I'm sorry. I think I  
8 have to say that these terms, labels, kind of meld together in  
9 various sorts of ways. I just want to get to the idea of do I  
10 have authority to deal with these kinds of things? And  
11 standing, mootness, ripeness, those are all prudential  
12 doctrines designed to avoid direct confrontation with the  
13 fundamental proposition is this a matter that can be resolved  
14 under Article III.

15 MR. HASSELL: Sure. And so on that, on that, what we  
16 would observe, Your Honor, is that, like I said earlier, there  
17 is no private right of action for this sort of thing. Where it  
18 comes up, like was the case in *Geier*, like was the case in  
19 *Williamson*, it comes up as a defense.

20 And so that signifies, we think, that a private entity  
21 and certainly an associational private entity that features  
22 distinctions between its members' different situations -- there  
23 was plenty of evidence about this last week, about how  
24 different OEMs do things differently. Some have gateways, some  
25 don't. Some use telematics, some don't.

1           THE COURT: We'll get to that, but for present  
2 purposes I'm really asking the question are you simply saying  
3 time will tell whether we enforce this? Is that what it comes  
4 to?

5           And of course I'll make my own determination about  
6 whether that's credible. But, you know, the argument that's  
7 being made here is, "Hey, what more do you need? There is an  
8 agency that has responsibility for enforcing a law. Are we  
9 supposed to wait until they enforce the law before we can bring  
10 this action?" Because that's the thrust of this aspect of your  
11 opposition to any action on my part.

12          MR. HASKELL: I mean, that's certainly the implication  
13 of the Supreme Court's decisions in *Geier* and *Williamson*. In  
14 that case it wasn't a public enforcer. It was a private right  
15 of action that brought those issues up. But that's certainly  
16 the implications of those decisions.

17          THE COURT: Okay. So let's just briefly pause on  
18 private right of action. There's nothing to bar right now  
19 someone under 93A to bring a private right of action against  
20 them, right?

21          MR. HASKELL: That's right.

22          THE COURT: So you say just have to wait until there's  
23 a defense -- they just have to defend as an affirmative defense  
24 under those circumstances?

25          MR. HASKELL: I think that's the right way to do it,

1 Your Honor. And one feature of that approach --

2 THE COURT: Why is that --

3 MR. HASKELL: One feature of that approach is that, I  
4 believe we cited this in our Rule 12 motion papers, there's  
5 actually state law to the effect that impossibility may be a  
6 defense to a Chapter 93A complaint. And so I think the benefit  
7 of that approach is dealing with impossibility in the context  
8 of a consumer protection complaint, "Hey, we aren't doing this  
9 because we can't do it," is a very different ball of wax than  
10 dealing with it in the context of a pre-enforcement facial  
11 preemption challenge that says, "Hey, this law is always  
12 unconstitutional all the time."

13 THE COURT: Well, I don't find helpful the references  
14 that have been made to "facial" and "as applied" under these  
15 circumstances. They just mask, from my perspective, the  
16 underlying policies.

17 And the underlying policy is this: What does it take  
18 to get a federal court to do something, and do you need some  
19 specific jurisdictional grant that says you have a private  
20 right of action to sue the Attorney General for these kinds of  
21 things? Or something less.

22 You've taken the position, I think, that they just  
23 don't have a private right of action. They've got to wait  
24 until this case comes forward in an enforcement setting, and  
25 I'm not sure that that's the proper way to read the

1 responsibilities of the federal court in dealing with the  
2 supremacy clause. I guess that's really what I'm getting at,  
3 but I'm not right there on where we do draw those lines.

4 But I will -- I think I should tell you that I draw  
5 the conclusion that you would enforce this if you had a chance.  
6 Right now you've chosen not to, and that I think changes the  
7 dynamic of this aspect of your argument.

8 So you'll think about whether you want to refine what  
9 you have to say, but that's a finding of fact that I think I'm  
10 going to be making, directing myself to, and I've told you my  
11 inclination right now on that finding of fact to deal with this  
12 argument that I was pressing the defendant on.

13 MR. HASSELL: I mean, what I would come back to on  
14 that, Your Honor, I suppose is, like I said a moment ago, our  
15 office represents the public, and our interest is the public  
16 interest, and what we want to see happen here is to come to the  
17 right thing. And so even though we might be authorized to  
18 enforce this law doesn't mean that we're necessarily going to,  
19 especially with these concerns about, "Hey, we can't do it for  
20 model year '22."

21 I want to tread lightly here in part because these are  
22 decisions that will be made in consultation with other folks in  
23 the office, but as a general principle, that's where we're  
24 coming from.

25 THE COURT: You know, I'm not being -- I hope I'm not



1 being snarky or arch or anything like that on these kinds of  
2 things. But, you know, you want to do the right thing, but you  
3 don't want somebody telling you to do the right thing or having  
4 an enforceable order that makes you do the right thing,  
5 whatever the right thing is, and that's what this comes to:  
6 the request to have the federal court get itself involved in  
7 directing the Attorney General to do the right thing, which  
8 you've always wanted to do anyway.

9 So now I'm just trying to figure out under what  
10 circumstances, if any, I can do that or should exercise it, but  
11 that's the kind of looming problem from my perspective in this  
12 area. So let me step back. Is there more that you want to say  
13 about this?

14 MR. LINDER: No, Your Honor. I think you have it  
15 right. The AG, the first time they said they want to get the  
16 right answer, said that if that means threatening enforcement,  
17 they'll do it. I think you have everything you need to make  
18 that finding of fact, Your Honor.

19 THE COURT: We'll see, but I've forewarned on this to  
20 shape whatever conversations you have within the office. I  
21 don't view it as inappropriate for the Attorney General to say,  
22 "We got a statute and we have to enforce it." You're put in an  
23 odd position -- not odd, but you're put in a difficult position  
24 because you're the enforcer, you're the administrator, all of  
25 the stuff that's involved in that, and you have special

1 responsibilities to approve the language in certain ways that  
2 make it that it's coherent. But there we are, and here I am to  
3 deal with those things.

4 MR. HASKELL: May I add one point? This is a slight  
5 -- well, it hooks onto something that was said earlier, having  
6 to do with NHTSA's role in all of this, and the word  
7 "desuetude" was mentioned I think with respect to the state  
8 actually, but I think "desuetude" is the right word for what  
9 NHTSA has done in this space, that is, issued nonbinding  
10 guidance, nothing enforceable, hasn't done really much of  
11 anything in the past couple of years.

12 And in our view -- and this goes back to the quality  
13 of the United States's statement of interest in this case. In  
14 our view, that's reason for a state like Massachusetts to get  
15 involved in this space where NHTSA isn't addressing these  
16 issues that, you know, I think a lot of folks, certainly most  
17 of the voters in Massachusetts, agree ought to be addressed.  
18 Under notions of federalism, this is where a state ought to get  
19 involved and frankly put pressure on NHTSA to do what it's  
20 going to do or not do what it's going to do.

21 THE COURT: Another way of looking at it, though, is  
22 that this is precisely where there should not be 50 states and  
23 a couple of territories making individual judgments. It's one  
24 thing under the Clean Air Act to do that. It's one thing to  
25 essentially under the Clean Air Act subcontract it to

1 California, which is essentially what was done through CARB.

2 This is not the same thing. This is the potential  
3 that New Jersey's going to have something like this and that  
4 Indiana is going to have something like this. And the whole  
5 purpose -- not whole purpose but a fundamental purpose of the  
6 constitutional compact is to say, "We don't want a bunch of  
7 these different states doing different things because it will  
8 substantially degrade the ability of a nation to have a place  
9 in, well, international commerce.

10 I mean, if you think about what this court is, this  
11 particular court, we were called the admiralty court for the  
12 first 120 years. Why were we called the admiralty court?  
13 Because that's what we did, international commerce by  
14 admiralty. How did we ever get to have federal courts? I  
15 mean, there's no reason why we have to have inferior federal  
16 courts. The Constitution didn't even ask for them or didn't  
17 even provide directly for them. They said, "It's up to  
18 Congress. They can create inferior courts."

19 Why did they create an inferior court called a  
20 district court or then a circuit court? They did it because  
21 they were afraid that every one of these little jurisdictions  
22 would be doing something different, and they knew that people  
23 wanted to do commerce with the United States -- a united  
24 states -- wouldn't want to worry about which venue they were  
25 in, and so they created these national courts. But that's

1 where the national courts came from. Meaning that the  
2 constitutional compact was directed at the idea that we can't  
3 have a thousand flowers blooming in this area if it interferes  
4 with dominant federal interests.

5 So that's I think part of the reason that saying,  
6 "Well, let's have Massachusetts be the actual laboratory for  
7 this sort of thing," doesn't work.

8 MR. HASKELL: Where Congress has enacted an express  
9 preemption clause, absolutely. Where it's occupied the field,  
10 absolutely. Where there are clearly expressed federal  
11 objectives that Massachusetts would hinder, absolutely. But  
12 those things aren't the case here. And where those things  
13 aren't the case, I guess the point I'm making is that a state  
14 regulation like Massachusetts, or even if New Jersey was to do  
15 its thing, would have probably the beneficial effect of  
16 requiring NHTSA to get its act together and do what it's going  
17 to do on this.

18 THE COURT: That may be so. I mean, as a practical  
19 matter, shaming them into action.

20 MR. LINDER: Your Honor, if I may on that point, I  
21 don't want to leave the Court with the misimpression that  
22 there's desuetude here.

23 When NHTSA ordered the recall in 2015, that was a shot  
24 across the bow. All of the industry -- you heard from the  
25 experts -- the industry started taking very seriously

1 cybersecurity. It is in evidence that the OEMs meet and talk  
2 regularly about cybersecurity with NHTSA. Mr. Lowe testified  
3 that he was meeting with NHTSA on cybersecurity issues. They  
4 are very active in this field. This is not the Maytag  
5 repairman. They're just doing it well.

6 THE COURT: I think, to the contrary, I don't think  
7 it's the Maytag repairman. On the other hand, I have to say  
8 that, looking at it, there is an industrywide sense that this  
9 isn't one that's going to get them in trouble or at least they  
10 don't want to worry about it right now. So that's what it is.  
11 I mean, that's the state of the record here.

12 I listened to the testimony of Mr. Tierney. I think I  
13 understand more now about the automobile industry than I did  
14 before, and you know --

15 MR. LINDER: Us too.

16 THE COURT: They work in particular ways. And whether  
17 that's determinative or not, it is the case from a governance  
18 point of view that NHTSA ought to be dealing with this if they  
19 really care about it and dealing with it in specific  
20 regulations, if they really care about it, or if they're not  
21 going to be taking the position that, "We'll wait and see, and  
22 then if somebody bad happens, we'll say 'We're shocked, we're  
23 shocked by this, and now we're going to recall,'" which is the  
24 worst possible outcome for everybody involved.

25 But it's back to this game of chicken. That's really

1     what I'm concerned about, and there are a variety of different  
2     chickens walking across the road.

3             MR. HASKELL: Your Honor, if I may. And I would be  
4     happy to answer any questions the Court might have on this  
5     topic. A topic that we wanted to address at this hearing today  
6     has to do with the possibility of immediate compliance with the  
7     law. So getting past all of the legal hurdles, the notion that  
8     a manufacturer like General Motors or FCA has what they need to  
9     comply with the law right now or as of December 3, 2020. And  
10    that brings us back to, first, the provision of Section 2 of  
11    the law that says you can just get out of the authorization  
12    business for access to OBD systems, and then second, with  
13    respect to Section 3, the notion of not selling telematically  
14    equipped cars.

15            Now, on Section 2, get out of the authorization  
16    business, there was plenty of evidence last week to indicate  
17    that that's exactly what some manufacturers do right now, in  
18    fact what most manufacturers do right now. That is --

19            THE COURT: But they're not out in the way that that  
20    statute means. They've got their own people that they like to  
21    deal with. They're friends. And, you know, it may lead to all  
22    kinds of discussions about whether it's manufacturer-related  
23    and that sort of thing. But they're not about to turn it over  
24    to some independent third party, whatever that might mean under  
25    these circumstances. Similarly for section 3. And, you know,

1 I'm trying to be fair to each individual provision of the  
2 statute, but they meld together in my mind.

3 MR. HASSELL: Well, what's significant about Section 2  
4 is the first provision about a manufacturer not requiring  
5 authorization to access the OBD system, it actually dovetails  
6 with the testimony that the Court heard in the affidavit of  
7 Greg Potter, and that's precisely why we put in that evidence.

8 THE COURT: Directly or indirectly, right.

9 MR. HASSELL: Right. And the way it works right now  
10 is, as the evidence showed, is manufacturers provide what's  
11 needed to access the OBD system, the Equipment and Tool  
12 Institute. They then distribute those methods of access to  
13 folks who make scan tools. And then even in a situation like  
14 service mode 27, where the repairperson needs some special  
15 authorization to execute that function, it's not the OEM that  
16 provides the authorization. It's baked into the tool, and  
17 that's okay. That's the difference --

18 THE COURT: It's baked into a tool that's authorized  
19 by the manufacturer. I mean, you know, they're keeping control  
20 -- of course they don't care about interrupting that process.  
21 That seems to work pretty well, and it serves their purposes  
22 for the old Right of Repair statute. They got it worked out.  
23 So they maintain their control over who gets access to it. It  
24 has buy and large tried to undercut the potential for the truly  
25 independent, the local guy down the street doing it, who is not

1 authorized, wouldn't get the tool, unless they said, "You're  
2 authorized to get the tool," or, "You're within the scope of  
3 the people who get the tool."

4 MR. HASKELL: That, Your Honor, I guess goes to this  
5 notion of directly or indirectly and the role that the  
6 manufacturer plays itself in controlling access, saying, "Yes,  
7 you can access that system," or "No, you can't. You have to  
8 get permission from us for this session."

9 That's not the way the system works right now, with  
10 the exception, with the very conspicuous exceptions of General  
11 Motors and Chrysler, which we heard from the evidence do things  
12 differently. If you want to repair a General Motors vehicle,  
13 that tool can't do it for you. That tool has to go talk to  
14 General Motors and get their permission.

15 THE COURT: Well, I'm not sure that the record is so  
16 clear to me with respect to that. And then I would go to ask  
17 the question of where is the evidence that this is a problem  
18 within the association.

19 If I think about it this way, that is to say there's a  
20 height here of generality which has to do with the ability of  
21 everybody to insulate themselves from the process of making  
22 this available to anybody. That's the high level issue.

23 Then there is the lower level issue, which is they all  
24 have different ways of doing things, and those different ways  
25 of doing things may include, some people are more willing to



1 let more people get involved, which may be part of their  
2 business plan, which may be necessary to encourage people to  
3 come work with us because we'll work with your guy down the  
4 street, that kind of thing. I don't have any evidence of that,  
5 but that may be part of it.

6 But there isn't a suggestion -- and this goes to the  
7 question of -- that doesn't appear to be in the evidence here.  
8 This goes to this question of associational standing, which is,  
9 you know, this kind of lingering stuff in case law that says  
10 the courts should be sensitive to the potential for conflicts  
11 among members of the association. I've got no evidence of  
12 conflicts about anything. Nobody is raising hell about this.  
13 They all seem to be prepared to be in the same boat so that  
14 they can, at the high level, be sure that the federal  
15 government doesn't or states or the federal government doesn't  
16 interfere, and then at the lower level, each one has their own  
17 way -- potentially has their own way of doing things.

18 MR. HASKELL: Can I push back on that a little, Your  
19 Honor?

20 THE COURT: Sure.

21 MR. HASKELL: So the evidence is in Greg Potter's  
22 affidavit, in Greg Potter's direct testimony where he speaks  
23 about the way that most OEMs bake the sequence into the tools  
24 so you don't have to go to the OEM, and he specifically  
25 identifies OEMs that use one of these gateway, "You have to get

1     our permission first" systems like FCA uses --

2             THE COURT: I'm sorry. Why is the tool any different  
3     from direct authorization? I mean, you know, we'll let you do  
4     whatever you want. You do have to have this tool, and guess  
5     who authorizes the tool?

6             MR. HASKELL: Well, it's important, Your Honor,  
7     because it doesn't give the OEM the opportunity to say, "No,"  
8     or it doesn't give the OEM the opportunity to say, "We're going  
9     to make you jump through these extra hoops or buy this  
10    subscription or do our thing before we're going to allow you to  
11    access the OBD systems on our vehicle." That's the difference  
12    between FCA and the other OEMs.

13            THE COURT: Well, I'm not sure it's all the other  
14    OEMs, but I do recognize that there are some differences, but  
15    I'm not sure that they are differences -- they are  
16    distinctions, certainly. I'm not sure they make a difference.

17            MR. HASKELL: And the reason, I think, the reason Your  
18    Honor just spoke about conflict among the OEMs and some jumping  
19    up, the ones that are jumping up, General Motors and FCA, are  
20    the ones who frankly wouldn't comply with Section 2 right now.

21            The ones who do it this other way, not requiring OEM  
22    permission for a diagnostic session, putting the means of  
23    access into the tool rather than requiring you to go to the  
24    back office, those are the OEMs who haven't said a peep about  
25    this law, who haven't stepped forward. And in our view, that's

1 significant.

2 THE COURT: No, that's right. You join the  
3 association. The association serves some broad interest that  
4 you have and they leave you alone on the rest.

5 MR. HASKELL: Well, I guess this goes back to our  
6 argument about associational standing.

7 THE COURT: It does.

8 MR. HASKELL: General Motors and FCA really aren't  
9 representative. And the evidence has shown that they don't  
10 stand in the same shoes as all other members --

11 THE COURT: But they wouldn't be members of the  
12 association if they all stood in the same shoes. That's the  
13 whole idea of an association. It brings together people with  
14 somewhat diverse interests, but they may have a shared  
15 interest, and that's the one I think I'm focusing on here, so  
16 long as there's not an imposition, as the labor union kinds of  
17 cases would have created, the kinds of cases that occupy the  
18 interest of the Supreme Court in the early '70s, you know, that  
19 kind of backsliding on that issue. But I think I understand  
20 that point, although you, I'm sure, understand how I'm  
21 responding to it.

22 MR. HASKELL: Certainly, and I think I've said what I  
23 wanted to say in the way of Section 2 being susceptible of  
24 immediate compliance.

25 Section 3, immediate compliance, I think we all agree

1 comes down to this notion of just turn off your telematics so  
2 you're not subject to the law.

3 THE COURT: But what kind of compliance is that? It's  
4 the compliance of death? They dispose of what they have, and  
5 they're said to be in compliance. No, it's not that they're in  
6 compliance. It's that they're not in in compliance, which is  
7 just a way of playing with words as far as I'm concerned.

8 Here is the law. The law says here's how we want  
9 automobile manufacturers to deal with what they've got. And  
10 you say it's compliance or you argue it's compliance by just  
11 withdrawing from the field. I'm not sure that's compliance.  
12 That's just simply saying, "We don't want to play anymore."

13 MR. HASSELL: Well, that might be the point of  
14 departure there about withdrawing from the field. We don't  
15 believe that that is what this disabled telematics proposal  
16 represents.

17 So the scope of the law is limited to cars with  
18 telematics systems, and so what we see the plaintiff relying on  
19 in their brief that they submitted a couple of days ago is  
20 this, it was the *Mutual Pharmaceuticals v. Bartlett* case, the  
21 notion that just stop selling your product isn't an answer to  
22 preemption. But that's not what we're proposing here. It's  
23 not stop selling your product. It's remove this one feature  
24 from your product.

25 Now, a way to look at this --

1           THE COURT: Well, I've got a product that I think has  
2 got all kinds of value, and what you'd like me to do is face  
3 the -- I won't call it impossible choice but face the choice  
4 of, do I offer my product the way I want to offer my product,  
5 or do I not? I strip it of features that I think are important  
6 to my product. I think they're important -- if I were thinking  
7 commercially, I'd think they're important because I can make  
8 people pay money for them in one form or another. I don't get  
9 everybody to pay money for them because they tend to drift off  
10 after the first year. But in any event, I get to monetize that  
11 in the same way that the big box people want to monetize this  
12 or look for ways to monetize this. That's what capitalism is  
13 all about. People should be encouraged to use innovation to  
14 monetize, and that drives these sort of things, but there is no  
15 question that you're taking away from them the ability to offer  
16 their product as they see that product. And it's not just  
17 saying you can't have raw lead on your handles because that  
18 would hurt little kids. This is to say you've got a kind of  
19 product that you offer that makes people come back and check in  
20 with your people for follow-on service kinds of things. That's  
21 fundamental.

22           MR. HASKELL: Fundamental -- well, that may be another  
23 point of departure. In our view a telematics system on a  
24 vehicle is not fundamental. These things didn't exist before  
25 not that long ago, and it's kind of nice to have more than a

1     you-need-to-have feature of the vehicles.

2             And a way to look at that is, hypothetically, if  
3     Massachusetts were to pass a law that says vehicles sold in  
4     Massachusetts can't have telematics systems, period, full stop,  
5     don't do it in our market, would that be a federal preemption  
6     problem?

7             THE COURT: I hate to say let's ask NHTSA, but that is  
8     the question, and I suspect even I can figure out what NHTSA  
9     would say, which is, these have dimensions of safety, and so  
10    disabling them would pose a problem.

11            MR. HASSELL: Your Honor, respectfully, I don't think  
12    that's right, and we know that from several sources of evidence  
13    that we heard in trial. One was both of the plaintiff's  
14    experts admitting that the things they're worried about, if you  
15    turn off telematics, it's going to do this, that and the other  
16    thing to the vehicle, everybody was in agreement that that  
17    would not create a federal safety problem. What's more --

18            THE COURT: The experts were -- we're talking about  
19    NHTSA now. We're talking about the agency that is charged with  
20    responsibility for that sort of thing. I mean, one of the  
21    solvents of the hot tub is it wipes away some of the  
22    excrescences that people have had applied to them through the  
23    theory of the case that the parties have.

24            So these guys say, "You know, is that so bad? Is that  
25    so much of a problem?" But they still had a dimension of

1 safety involved here. I don't think anybody was walking away  
2 from the idea that telematics has safety dimensions to it. Not  
3 as, you know, fulsome perhaps as others, that it was another  
4 form of diagnostics for non-safety things, but somebody gets a  
5 hold of that stuff, I think it's pretty clear that there's a  
6 problem.

7 MR. HASKELL: Here is the proof in the pudding, Your  
8 Honor. We heard testimony, I believe it was from Mr. Garrie,  
9 during the hot tub that not all cars sold in the states right  
10 now have a telematics system. Cars that are sold without a  
11 telematics system, are those unsafe? Mr. Tierney testified  
12 that, no, you turn off the telematics in a GM vehicle, it's  
13 perfectly safe. Does NHTSA have a problem with those? Is  
14 NHTSA recalling those? Is NHTSA saying you need to have a  
15 telematics system because you're unsafe without one? No.

16 THE COURT: So again, it's a matter of what does NHTSA  
17 do, I suppose, in addressing that. And I would be very  
18 surprised if someone from GM says that there are out on the  
19 road now a bunch of dangerous cars because some of them don't  
20 have telematics. This is a process of developing models over a  
21 period of time in the shadow, I suppose I would say, of  
22 something like NHTSA.

23 But I think I understand the argument, and I have read  
24 and I'm going to reread obviously the testimony of the experts,  
25 the testimony and the development that was provided in the hot

1 tub.

2 MR. HASKELL: Certainly. I guess just to kind of sum  
3 up our point on this notion of immediate compliance by  
4 disabling the telematics is it's perfectly safe, it's perfectly  
5 feasible, it's immediate. It can be done just in Massachusetts  
6 because it basically involves going under the hood and  
7 switching the system off for each car that's sold in  
8 Massachusetts.

9 THE COURT: And then if I drive into Massachusetts  
10 from Albany, I have to disable my telematics?

11 MR. HASKELL: No. The law --

12 THE COURT: If I sell my car from Albany to someone in  
13 Holyoke, somebody's got to disable the telematics, one of us?

14 MR. HASKELL: That was a point that the evidence  
15 actually addresses, we addressed in response to an  
16 interrogatory, which I believe is in evidence now. And what we  
17 said on that, what the evidence shows is that's certainly not  
18 something for which liability would be imputed to the  
19 manufacturer.

20 THE COURT: So aftermarket transactions are not  
21 covered? That's your position as an enforcement matter?

22 MR. HASKELL: I believe -- I would double-check our  
23 interrogatory on this. I believe our position was a little  
24 more nuanced than that.

25 THE COURT: I'm not asking you, because I mean this to



1 be for all of us to think some more about it, but I'm not sure  
2 that I think that the Attorney General has or could properly  
3 choose not to enforce against aftermarket modifications, and  
4 that means that it falls to the manufacturer to be cognizant of  
5 the potential for aftermarket modifications as we find in the  
6 context of emission control.

7 MR. HASKELL: Mr. Toone has just reminded me here that  
8 as a matter of Chapter 93A law, private sales aren't covered by  
9 Chapter 93A.

10 THE COURT: Chapter 93A, as we all understand, is not  
11 the universe of enforcement of this statute.

12 MR. HASKELL: And that used car dealers, in our view,  
13 are responsible for complying. But again, that's the  
14 responsibility of the aftermarket dealer, not the  
15 responsibility --

16 THE COURT: Under Chapter 93A.

17 MR. HASKELL: That second point is our view of the  
18 enforcement of the statute.

19 THE COURT: Including by the Attorney General? And I  
20 guess I'm not sure that I know that that's been embodied in a  
21 response of what the Attorney General's reading of the statute  
22 is. I don't understand you to have taken that position or be  
23 in that position right now. But if you're saying as a matter  
24 of enforcement we do not enforce aftermarket responsibilities  
25 of manufacturers, however nuanced that is, and you can be quite

1     nuanced obviously for this matter, it's a different matter.  
2     Whether I believe that or not is another matter altogether as  
3     well.

4             MR. HASKELL: Of manufacturers, yes, that's right.

5             THE COURT: Okay.

6             MR. HASKELL: So where this possibility of disabling  
7     the telematics system is available, it's safe, it's immediate,  
8     and it is compliant with the law, you know, under *Mutual*  
9     *Pharmaceutical v. Bartlett*, that wouldn't be telling the OEMs  
10    to stop selling the product, to get out of the market. It  
11    would be saying you've got to modify your product in a way  
12    that's perfectly permissible if you want to comply with Section  
13    3 of the law.

14            THE COURT: Right. I'm certainly going to try to get  
15    my head around the idea that I'll shoot myself in the foot  
16    before I do anything like this, which is essentially what that  
17    is. That is to say you're telling the manufacturers to say,  
18    "Do away with all of this and you will comply with what appears  
19    to be the law of the Commonwealth, which is, we want to make  
20    this as broadly available as we possibly can." I don't know  
21    how I could read the structure of the statute, the purpose of  
22    the statute as being anything other than we, the people, want  
23    access to everything that is available; not that we, the  
24    people, would like to have the manufacturers disable this extra  
25    dimension to their product, if that's what it is.

1 MR. HASSELL: Very good point, Your Honor. And let me  
2 speak just briefly to that. The reason that the hook in  
3 Section 3 is you have to have a telematics system before the  
4 law requires all these other things, is the concern that a  
5 telematics system -- Mr. Lowe testified about this -- the  
6 concern that a telematics system could be used as an end run  
7 around the existing right Right to Repair law.

8 And so in our view that would be perfectly consistent  
9 with the notion that the intention of this law is to guaranty  
10 access to diagnostic information. If an OEM turns off their  
11 telematics system, then they've eliminated that loophole.  
12 They've eliminated the ability to do an end run around the  
13 existing Right to Repair law, and that information would need  
14 to flow through the OBD system.

15 THE COURT: That has a superficial attraction, which I  
16 think will probably fade as I think about it more carefully.  
17 So I understand what you had to say.

18 MR. HASSELL: Anything else I can answer?

19 THE COURT: I mean, I put it out, I put it out, and I  
20 do want to get to -- I want to be sure that I haven't missed  
21 anything that I want to talk about here and also to invite  
22 anything further that the parties might do to refine their  
23 positions here.

24 This has all, as I said, been meant to be provocative,  
25 and it is being done in two parts to permit this as I work my

1 way through because I think I have a deadline, even if it's  
2 only precatory, as I've now learned on the part of the Attorney  
3 General, because you're not going to do anything if I don't act  
4 by August 1. I don't think that's true.

5 In any event, that's what I'm obligated to do. So,  
6 are there other things that the parties would like -- I've read  
7 the briefs very carefully, and I will read them, reread them as  
8 well, but are there any other issues that the parties at this  
9 point want to raise with me and focus on? Anything else?

10 MR. NADOLENCO: Not from our side, Your Honor.

11 THE COURT: Okay. Mr. Haskell?

12 MR. HASKELL: I guess what we would just say on that  
13 is, this may summarize some of the things we've already talked  
14 about today, but our view is that the evidence showed that  
15 there's really no question that automobile manufacturers can do  
16 this. The question is when can they do this, and then that  
17 goes back to the --

18 THE COURT: When and how many resources, a whole  
19 series of things, but I question whether I'm in a position to  
20 say. I mean, I can think about the history of automobiles that  
21 I'm learning more and more about in the automobile industry.  
22 And if they want to do it, they can do it, and they can do it  
23 really fast. And if they don't want to do it, they don't do  
24 it, and they do it so slow that they don't do it at all. But  
25 can I turn to them and say, "You know, your model year

1 development has to be 18 months," or that sort of thing? Not  
2 on this record. And I'm not even sure that that's what James  
3 Madison had in mind for federal judges and Article III. Pretty  
4 sure he didn't.

5 But the question is how to frame this properly to deal  
6 with the specific case in controversy presented to me and  
7 perhaps to direct to the agencies with the proper competence  
8 the conception of responsibility that all of this implies.  
9 Because we're dealing with -- we're all in agreement we're  
10 dealing with very serious stuff, and it's very serious stuff in  
11 ways that we didn't even understand six months ago, I suppose.  
12 And there's nothing worse than having a bunch of amateurs in  
13 there fooling around with that sort of thing.

14 MR. HASKELL: May I speak to that, Your Honor? And  
15 then I'm happy to call it done after that.

16 THE COURT: Right.

17 MR. HASKELL: The Court is absolutely right that it  
18 goes to the nature of the case in controversy and what has been  
19 proven here by the plaintiffs.

20 And our view, the point that we'd like to make is that  
21 if the Court agrees that the plaintiffs have proven that it is  
22 actually impossible for them to do this, but it's only a  
23 limited period of time during which it's impossible for them to  
24 do this, then the remedy isn't to say, "Hey, you don't have to  
25 do this." The remedy is to say, "Here is the injunction that

1 gives you the time to do this." And that, in our view, is  
2 tailoring the remedy to what's been demonstrated.

3 And to be clear, we don't think there's preemption  
4 here. There are a bunch of legal and factual reasons why we  
5 think the analysis should never even get that far, but if we do  
6 get that far, and what they've proven is a temporary  
7 impossibility of compliance with both state and federal law,  
8 then the remedy is temporary in nature in our view.

9 THE COURT: Okay.

10 MR. HASKELL: And there's evidence to support what  
11 that period of time ought to be.

12 THE COURT: Okay. I think I understand the view. Mr.  
13 Nadolenco, did you want to have the last word, even if it's one  
14 that has been said repeatedly before?

15 MR. NADOLENCO: Thank you, Your Honor. I hope not to  
16 repeat myself. We agree with the Court's instincts that we  
17 don't know that on the record before the Court it is able to  
18 say compliance -- and it's not compliance, by the way. It is  
19 safe compliance, that would be the task -- compliance is  
20 possible by this model year or that other model year.

21 Thus, the more prudent course we believe for the Court  
22 is to simply rule on the law as written. And this law, as  
23 written, is impossible to comply with without stripping the  
24 cybersecurity protections from the car. Therefore, it flies in  
25 the face of the Safety Act and the EPA, and the Clean Air Act

1 and therefore is preempted.

2 THE COURT: All right. So let me then go back to  
3 scheduling. We have something now for July 21st. I would like  
4 to set a date seven days before that for the final proposed  
5 findings and conclusions which are tied specifically to the  
6 evidence that now is in place. That will give you a real date  
7 for that.

8 There may be supplemental findings or conclusions that  
9 you want to include in that. Feel free to do it. But just  
10 identify it in your markup that does that that says, on  
11 reflection, in light of questions that the Court has asked,  
12 this is your thought process -- you don't tell me this -- but  
13 here are some additional things that we think the evidence  
14 supports in this case and legal propositions that we think the  
15 Court should adopt as conclusions. I'm not sure there's a lot,  
16 but there may be some.

17 So I get my final findings of fact and conclusions.  
18 Obviously I'm going through this at the same time trying to  
19 work my way through, but I want to be able to have something I  
20 can check before we have a final discussion about it on July  
21 21st. I will entertain argument, written argument. I'm not  
22 looking to make more work for people. But you've heard me  
23 expressing my views, testing different propositions. You may  
24 think I need remedial work. Focused remedial work on my  
25 speculations is welcome here. I wouldn't write a new brief.

1 These briefs are very good. I've got the stuff that I need,  
2 and I'm working through it, but you may say, "He's wandering  
3 down the wrong road. Let me just give him a couple of pages  
4 that says, 'Look at this case, look at this case,'" that kind  
5 of thing.

6 I'm not inviting it, or I'm not telling you  
7 everybody's got to think of new things to send to me, but if  
8 there's something that this conversation has generated, then of  
9 course I'd like to have that again by, I guess the 14th is what  
10 I'm talking about here. Beyond that, I'm not sure that there's  
11 anything else that I really want here. I mean, now the ball is  
12 in my court on this, but I appreciate all the work and support  
13 that I've received.

14 MR. NADOLENCO: So just a question, Your Honor, having  
15 learned a valuable lesson in preparing for today's hearing,  
16 what does the court envision for the hearing?

17 THE COURT: I think right now and I think probably  
18 after I look at things on the 14th, I might give a little  
19 agenda. But right now, because they bring together in my mind  
20 now -- and there was another standing case today, by the way,  
21 by the Supreme Court -- the question of what standing would  
22 mean to these other add along after -- as far as I'm concerned  
23 really after Count One. Count Two I think is not likely to be  
24 successful on the record here.

25 And then we've got these other counts. And those



1 ones, it seems to me, can't be decided until something is taken  
2 or something is in fact displaced for copyright purposes,  
3 whatever. I just think it's too early to deal with those, or  
4 at least I'm thinking in those terms, and so I'm likely to get  
5 rid of them on different grounds. But you'll argue otherwise  
6 that they have vitality.

7 Then I think I want to look carefully at the core  
8 issues that I'm troubled by, and I'll try to deal with that  
9 with an agenda item. I have to tell you that I am troubled by  
10 the idea of unballasted exercise of federal question  
11 jurisdiction. The law is not as clear as I'd like it to be on  
12 this, and so I want to think that through. I think I should  
13 have it, that it's not a violation of intent of Article III.  
14 But intent is one thing. It's trying to find the text and  
15 understand the case law in this area more fully. And I agree  
16 that the cases that have raised problems on this are  
17 distinguishable in their own terms, but I try to, we all do,  
18 try to derive the essence of them if we can.

19 Now, I think I've said but I want to restate that I do  
20 want to have from the Attorney General a view with respect to  
21 what your administrative responsibilities are and how they have  
22 to be exercised here.

23 MR. HASKELL: July 14th?

24 THE COURT: Yes, yes. And I'm not sure there's  
25 anything else that I want to bring to your attention right now.

1 I mean, there are things that will go through my mind and then  
2 pass out, so no reason to bother you with my trenchant views,  
3 but I'll try to have things that are specific. But you're  
4 right, this is not your closing argument to say, "Your Honor,  
5 this is a case about preemption," and then going on from there.

6 Any other questions about timing or anything like  
7 that.

8 MR. NADOLENCO: The only question about timing, Your  
9 Honor, is if they're going to file something about their  
10 administrative responsibility, we would potentially like the  
11 opportunity to review it ahead of time.

12 THE COURT: You'll get a chance. You will get the  
13 chance of seeing it on the 14th. If you want to send me  
14 something on it, I will be focused on that as well. I'm not  
15 sure what they're going to say, I mean, because I think this is  
16 a kind of knotty question of state administrative law of  
17 whether or not you have notice of comment for this kind of  
18 exercise of authority. I don't know that there's any case law  
19 out there on that. I haven't found any, but that just means I  
20 haven't found any.

21 There was a former Assistant United States Attorney  
22 who, whenever asked questions like, "Is there any case on it,"  
23 would say, "I know of no case to the contrary," which was  
24 commentary not on the state of the case law but the state of  
25 his knowledge of cases generally.

1           And so with that reservation, I welcome any help I can  
2     get on that. But that's a framework that I think I want to  
3     look at because, ultimately, I do think that the Attorney  
4     General has some role. You say it's very limited. I think it  
5     may be broader. But in any event, they have some role in  
6     defining the administrative context and what deference, if any,  
7     I exercise in dealing with that, particularly in this fashion  
8     when they haven't even exercised it yet and I'm asking them to  
9     tell me how they think they may exercise it in the future, may  
10    not strike you as at the core of the case, but it's something I  
11    want to have in my mind before I act on this. I mean, I now  
12    know how NHTSA is going to handle it, which is, wait and see.  
13    Okay. We will be in recess. Thank you.

14                   (Adjourned, 1:08 p.m.)  
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1 CERTIFICATE OF OFFICIAL REPORTER

2

3 I, Kelly Mortellite, Registered Merit Reporter

4 and Certified Realtime Reporter, in and for the United States

5 District Court for the District of Massachusetts, do hereby

6 certify that the foregoing transcript is a true and correct

7 transcript of the stenographically reported proceedings held in

8 the above-entitled matter to the best of my skill and ability.

9 Dated this 27th day of June, 2021.

10

11 /s/ Kelly Mortellite

12 \_\_\_\_\_

13 Kelly Mortellite, RMR, CRR

14 Official Court Reporter

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